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Obscenity, Pornography and Law Reform

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1. Introduction

This note is concerned only with obscenity and pornography in written or pictorial form, that is, books and magazines. To some extent, different considerations apply to television, theatre and motion pictures. The first section deals with the origin and development of the concept of obscenity; the second section attempts to articulate some differences between obscenity and pornography, and the reasons for greater concern about the latter; finally, a proposal for law reform is made.

One of the greatest obstacles to discussion of obscenity and pornography is definitional imprecision: people seldom agree on what the terms mean. If one cannot define what it is one is talking about, it is difficult to know what, if anything, should be done about it. Throughout this paper, I distinguish between obscenity and pornography. My working distinction is this: obscenity is material depicting, however explicitly, sexual activities between adult consenting human beings. Pornography is material whose principal theme is sexual activity between other than consenting adults: primarily depicting violence, bondage or torture of unwilling victims for sexual gratification; or sexual activity involving other than consenting adults (necrophilia, sexual activity with children, bestiality, etc.). The distinction is based on the type of sexual activity depicted. This is a distinction, not a definition. Even as a distinction, it has conceptual flaws. It is not always capable of exact application. But it has one saving virtue: it classifies questionable material into two categories in rough accord with actual practice in the trade. By and large, only obscenity (as distinguished above) is available over-the-counter even in "adults only" bookstores in Canada. Pornography is available under-the-counter or by mail importation. The practical utility of a definition or distinction is as important as its conceptual clarity. Professor Samek has pointed out that the search for a satisfactory definition of obscenity is futile: it has led to "... a wild goose chase after the true essence of the concept. 'What is (the essence of) obscenity?' does not lend itself

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to a true or false answer any more than the question 'What is (the essence of) time?' Legal concepts do not have one true essence which can be found. . . .'¹ The introduction to the Fox study paper² illustrates our present definitional confusion and validates Samek's observation. Rather than the multiplication of equally vague synonyms (which is what happens when people set out to define obscenity) I have chosen to adopt a working distinction which when applied to questionable material yields the same rough and ready classification which the trade itself follows. The distinction works and that is its value. In part it's application must remain intuitive, but this is probably inevitable in dealing with obscenity. In *Jacobellis v. Ohio* Stewart J. held that criminal prohibitions apply only to "hard-core pornography" and continued: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."³

2. *An Historical Digression*

It is usually instructive to consider a problem in historical perspective. But it can also be misleading if, as I believe, the contemporary problem posed by pornography is substantially different in kind and extent from the historical problem of controlling obscenity. The past bumbling, amusing attempts of old father antique, the law, to suppress the publication of the libertine exploits of a Fanny Hill or a Frank Harris contribute little to our understanding of how or why to control large corporate enterprises whose business is the production, importation and distribution of pornography on a large commercial scale.⁴ Understanding the origin of something can be useful, but along the way the problem may so change, in kind or dimension, as to require consideration as a wholly new phenomenon. While it is true that large elms from

1. Samek, Draft Study Paper on Obscenity, prepared for the Law Reform Commission of Canada, p. 6. A version of this paper is to be found in (1973), 1 Dalhousie Law Journal 265.

2. Richard G. Fox, Study Paper on Obscenity, published by the Law Reform Commission of Canada, June, 1972.

3. (1964), 378 U.S. 184, at 197.

4. The U.S. Commission on Obscenity and Pornography heard estimates of the scope of the pornography industry in the U.S. which ranged from 500 million to 2.5 billion dollars annually: Report of the Commission on Obscenity and Pornography, Random House, New York, 1970, p. 7.

small acorns grow the differences between them dwarf their similarities. So also, nuclear bombs may only be the most recent refinement of the bow and arrow, but the problems posed are new and call for entirely different responses. My contention is that today's "pornography explosion" (to use David Holbrook's term)⁵ poses problems for contemporary society different in kind and dimension from the traditional common law concern with offensive publications.

The first government sanctioned censorship of books was not for obscenity but for sedition and religious heresy. In 1577 the Stationers Company of London was incorporated by royal charter ". . .for the protection of manufacturers and readers of books."⁶ The Stationers Company burned books deemed heretical or seditious, and could impose penalties ranging from seizure and destruction of printing presses to imprisonment of recalcitrant printers. Three years later, the first reference to "licentiousness" crept into obscenity: William Lambarde, a Kent magistrate, draughted a bill (in fact, never presented to Parliament) the title of which indicates its purpose: "An Act to restrain the licentious printing, selling and uttering of unprofitable and hurtful English books. . . ." The preamble and the substance of the bill clearly indicated that it was blasphemy rather than obscenity that was considered "hurtful"; heresy, not sex, was disturbing.⁷

By the 17th century, the time of Cromwell and the Puritans, sex was regarded as a "sinful necessity" and reading about sex just plain sin. So sex gradually became linked to sedition and blasphemy as fit subjects for censorship. Yet what was censored in the 16th and 17th centuries was sedition and blasphemy, and it was in opposition to this kind of censorship that Milton's *Areopagitica* was directed: ". . .give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." Milton's eloquent plea has influenced all later discussions of censorship. But would the chaste and pious author of *Paradise Lost* defend today with equal eloquence those who commercially exploit bestiality, rape or sadism? Or was Milton, like other historical Cassandras, right in his own time and circumstances, and wrong in ours?⁸

5. *The Case Against Pornography*, ed. and with an introduction by David Holbrook Stacey, London, 1972.

6. C. H. Rolph, *Books in The Dock*, Andre Deutsch, London, 1969, p. 30.

7. *Id.*

8. *Ibid.* p. 34.

In 1708 a man named Read was prosecuted for writing a book with the intriguing title: "The Fifteen Plagues of a Maidenhead". Although the court acknowledged the book was "bawdy", Read was acquitted on the basis that the book was neither seditious nor blasphemous.⁹ In *Curl's* case¹⁰ in 1727, however, the accused was convicted of publishing an obscene libel in respect of a book entitled: "Venus in the Cloister or the Nun in her Smock." The early report of the case indicates the court's view that the book was an offence against religion. These two early prosecutions suggest that writing about sex alone was not considered "obscenity"; also required was an affront to ecclesiastical (blasphemy) or civil (sedition) authority.

The mid-18th century was a fertile time for the uneventful (at least, at the time) publication of some well-known erotic books: Fielding's "Tom Jones", in 1749 (one year after its author had been appointed a judge!); Cleland's "Fanny Hill" in 1748 (two centuries later to be prosecuted or withdrawn from sale under threat of prosecution in Britain,¹¹ the United States¹², and Canada¹³) and Harris' "List of Covent Garden Ladies" in 1780, the undisturbed predecessor of Mr. Frederic Shaw's "Ladies Directory" which resulted in the famous *Shaw v. D.P.P.* case in 1961.¹⁴ These, and other sexually explicit books, circulated freely in the 18th century. What prosecutions there were followed *Curl's* case by focussing on books and pamphlets which linked sexual explicitness with sedition or blasphemy.¹⁵

The 19th century was the great age of writing and reading. Not surprisingly there was a corresponding concern among some about what was being read. William Wilberforce's "Proclamation Society" one of whose purposes was to control "...the publication of obscene books and prints. . .¹⁶ was succeeded, in 1803, by The Society for the Suppression of Vice. The latter was devoted to the eradication of "...loose and licentious prints, books

9. *Queen v. Read*, 11 Mod. Rep. 142, 88 E.R. 953.

10. *R. v. Curl*, (1774) Barnardiston's Reports 29; 93 E.R. 849, E.R. 20. *Curl* was fined and made to stand in the pillory.

11. Withdrawn by the publishers under threat of prosecution in 1963.

12. *Larkin v. G. P. Putnam and Son* 242 N.Y.S. (2d) 746 (1963).

13. *R. v. Coles* (1965) 49 D.L.R. (2d) 34.

14. *Shaw v. Director of Public Prosecutions* [1961] 2 A11 E.R. 446.

15. Cf. *R. v. Wilkes* (1768), Burr. 2527; *King v. Gallard* (1733), W. Kelynge 162.

16. Rolph, note 6 above, p. 50.

and publications dispensing poison to the minds of the young and unwary".¹⁷ The *Vagrancy Act* of 1824 prohibited the exposing of obscene books or prints in public places.¹⁸ In 1853, a *Custom Consolidation Act* was passed to prohibit, *inter alia*, the importation of "...indecent or obscene prints. . . ."¹⁹ In 1857 the *Obscene Publications Act* was enacted empowering magistrates to order the destruction of books and pamphlets believed to be obscene.²⁰ The Act did not define "obscene" but, in 1868, the Hicklin case did. As with earlier prosecutions, the Hicklin case involved a sexually explicit but also anti-religious publication entitled: "The Confessional Unmasked". The Hicklin "test" became famous: "...whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."²¹

The 19th century was also the time of two gentlemen whose toil for the suppression of vice has caused their names to become synonymous with censorial and authoritarian dogmatism: Dr. Thomas Bowdler in England, and Anthony Comstock in the United States. Bowdler was an industrious Shakespearian scholar whose self-conceived mission was to "purify" Shakespeare so that the bard's work could "...with propriety be read aloud in a family. . . ."²² Ever since, "bowdlerizing" has been a term of abuse for someone who seeks to prune literature for those whose sensibilities are presumed to be less robust than his own. It is perhaps a commentary on changing social values that our contemporary bowdlerizers are those who have succeeded in removing (on the grounds of racial bias) Huckleberry Finn from schools and public libraries and who, by a system verging on blackmail of school text publishers, have set up in Ontario "an inter-ministerial textbook screening committee" to ensure that only strict orthodoxy (in their terms) prevails in school textbooks.²³ Is it not odd that those most certain that obscenity cannot corrupt young minds are equally certain that racism can?

17. *Id.*

18. 5 Geo. 4, c. 38.

19. 16 and 17 Vict. c. 107.

20. 20 and 21 Vict. c. 83.

21. (1868) L.R. 3 Q.B. 360.

22. From the preface to Bowdler's 10 volume edition of Shakespeare's work; as quoted in Rolph, Note 6 above, p. 50.

23. A study, jointly commissioned by the Ontario Human Rights Commission and

Anthony Comstock, a New York grocer, in 1873 founded a movement dedicated to the elimination of obscenity. By the turn of the century, the Comstock movement could claim to have been instrumental in the suppression or prosecution of Walt Whitman's poetry, George Bernard Shaw's plays, and novels by Dreiser, Joyce, Hardy and Balzac. Nor were ancient classics spared: Ovid's *Art of Love*, Boccaccio's *Decameron*, and Aristophanes' plays were all suppressed. Comstock boasted that he had personally destroyed more than fifty tons of indecent books, 28,425 lbs. of printing plates, and nearly four million obscene pictures.²⁴ If ever there was a man "into whose hands material of this sort fell" and open to "depravity and corruption" it was surely Anthony Comstock. Comstock's stolid, uneventful life and lasting moral zeal suggest that the causal connection assumed by the Hicklin test is dubious.

To advocate censorship today is to be considered an illiberal, hypocritical Pecksniff. This unfortunate stereotype is in part the legacy of Messrs. Bowdler and Comstock. Their exploits dramatically underline the danger of censorship and its ineradicable potential for abuse. It may be the opprobrium associated with past censors that makes any consideration of censorship offensive to many people. As Reo Christenson observed in the U.S. report on obscenity and pornography: "To most intellectuals these days, censorship in sexual matters is firmly identified with prim little old ladies, country bumpkins, back-water conservatism, cultural yahoos, and puritans in general"²⁵ Yet if it is true that contemporary pornography poses a problem different in kind and extent from that which existed in the past, then current proposals for control should not be prejudged and condemned on a guilt-by-association link with past moral "reformers".

The post-Hicklin history of obscenity is well known. The Hicklin test was the law in Canada until supplanted (at least partially) by a

the Ontario Institute for Studies in Education, led to the production of a report: *Teaching Prejudice* McDiarmid and Pratt, Ontario Institute for Studies in Education, Curriculum Series No. 12, 1971. The report, in turn, led to the creation of the Inter-Ministerial Textbook Committee in 1972 without whose approval a prospective school textbook is doomed to blush unseen in Ontario. Several other Canadian provinces (New Brunswick, Saskatchewan and Manitoba to name three) have been similarly diligent in censoring school texts.

24. *Liberty in The Balance*, H. Frank Way, Jr., McGraw-Hill, 2nd ed., 1967, p. 38.

25. The Report of the Commission on Obscenity and Pornography, Random House, New York, 1970, p. 624.

new statutory definition, now section 159(8) of the Criminal Code which focuses on "undue exploitation of sex" as the talisman of obscenity. Introducing the new section in 1959, the Minister of Justice said: "We believe that we have produced a definition which will be capable of application with speed and certainty, by devising a series of simple objective tests in addition to the somewhat vague, subjective test which was the only one formerly available".²⁶ Canadian cases since that time have shown that section 159(8) is neither "objective" (since it requires the Court to determine, inevitably subjectively "contemporary community standards") nor "capable of application with speed and certainty". Litigation is time consuming, and the results in Canadian obscenity cases suggest no greater certainty among Judges about what is obscene than among other people. It is very difficult to extract any consistent principle from the Canadian cases as to what kind of written material is acceptable or unacceptable. A decade ago, Professor Douglas Schmeiser wrote: "If one had to choose the most muddled law in Canada today, there is no doubt that the law relating to obscenity would be a top contender. It is muddled not so much in purpose — although there are some who would contest even this — but in definition, technique and interpretation."²⁷ The cases since Professor Schmeiser wrote have done little to dispel the confusion.

From this brief historical glimpse of the development of the concept of obscenity, it appears that obscenity was originally conceived not as sex, but as sedition or blasphemy. Only gradually did sex creep in as one element of obscenity, but even then only if linked to a challenge to ecclesiastical or civil authority. The complete equation of obscenity with sexual activity is a comparatively recent phenomenon. Obscenity has been a fluid, evolving concept adjusting to what were perceived to be problems at the time.

Obscenity today means essentially "undue exploitation of sex". Yet is this contemporary emphasis on sex as the defining element of objectionability consistent with present needs? It is submitted that our present definition of "obscenity" has diverted us from what is really objectionable — and that is pornography not obscenity. Perhaps the categories of obscenity, like the categories of negligence, are not closed, and it may be opportune to reformulate what material is to be regarded as socially objectionable and why.

26. Mr. E. D. Fulton, House of Common Debates (Can.) 1959, vol. 5, 5517.

27. Schmeiser, *Civil Liberties in Canada*, Oxford U.P., 1964, pp. 232-3.

But some people, upset at the haphazard, discretionary enforcement of our present obscenity law probably favour outright repeal. Others, properly wary of the abusive potential of any form of censorship, would favour complete freedom of expression as an incident of human liberty. Many people might find certain types of publication offensive, but nevertheless be unwilling to entrust the censor's power to any human being or institution.

One cannot but feel sympathy for these positions. Surely, no civilized person wishes to resurrect a contemporary Comstock or Bowdler. No doubt the safest way to insure against the abuse of censorship is to abolish it. And yet, and yet. . . for pornography, as defined above, is there not valid reason for concern? Does it not have recurrent worrisome characteristics? Would repeal of all criminal prohibitions and unrestricted availability be a net social benefit?

I do not pretend to have answers for these difficult questions. The prospect of unrestricted availability to adults²⁸ of the kind of material alleged to be obscene before Canadian Courts to date (*i.e.*, Fanny Hill, Lady Chatterly's Lover, "nude" magazines etc.) does not particularly concern me. But some of the material, obtained by the Law Reform Commission during its obscenity study ("pornography" within my definition) does concern me. In the next section, in an impressionistic way, I shall attempt to explain why. I do not claim a scientific method: rather I have attempted to articulate, on the basis of a subjective evaluation, those characteristics of pornography which seemed to me socially offensive.

3. Characteristics of Pornography

With regard to controlling pornography, I wish to make two points: (i) Our present concept of obscenity, focused as it is on ". . . undue exploitation of sex" is wrongly directed; and (ii) If one focuses on certain other "asexual" aspects of pornography, the case for legal prohibitions can be better understood. Obscenity originally was inseparable from sedition and blasphemy. Not until the mid-19th century (about the time of Hicklin's case) did obscenity come to be seen as something separate and entirely distinct from both sedition and blasphemy. Its distinguishing feature was sex. As such, it required a reason for prohibiting it different from the reason for prohibiting either sedition or blasphemy.

28. See part III for a discussion of the special considerations relating to minors.

In the century or so since *Hicklin* many reasons have been suggested for prohibiting obscenity: the Fox study paper enumerates them.²⁹ But they all have a common base: a fear of sexual arousal. The *Hicklin* case held obscenity to be that which would "...suggest to the minds of the young...thoughts of a most impure and ibidinous character."³⁰ Often this will be accompanied by concern that sexual arousal will in turn lead to overt sexual misbehaviour. The extensive research³¹ that has been done to determine whether or not this is so is sadly inconclusive. The 1959 Canadian Criminal Code amendment preserved the emphasis on "sex" and its "undue exploitation" as the reason for prohibition. The cases since the amendment vacillate uncertainly between a search for "depravity and corruption" and an attempt to determine when exploitation becomes "undue".

The important obscenity cases of the last decade have mainly involved erotic literature (*Fanny Hill*,³² *Lady Chatterly's Lover*³³) or magazines devoted to female nudity (*Dude*, *Escapade*,³⁴ *Film and Figure*³⁵.) The courts have had to consider how explicitly sexual acts (essentially heterosexual acts depicted in a context of affection, or at very least, consent) may be photographed or written about. The cases have concerned "obscenity" rather than "pornography" as I am using those terms. As a result of the rather tame material (obscenity rather than pornography) which has been judicially considered, there is a fog of unreality which envelops any discussion of censorship in knowing winks and sniggering witticisms. This must be dispelled. If we want magazines entitled "Donkey Love" showing, in minute detail, women fellating

29. Fox, note 2 above, pp. 24-29.

30. [1868] L.R.Q.B. 360 at 371.

31. Fox, *op. cit.* n. 2; at pages 27-33, footnotes 17-35. Fox cites numerous studies on this point. He concluded: "The belief that obscenity has a harmful impact on the outward behaviour of adults or adolescents is ultimately grounded in intuitive processes, clinical judgment and guesswork. Opposong views are generally based on the same shaky foundations although the sex offender and the Commission delinquency studies provide some scientific support for the view that obscenity is not the significant causal factor in criminality claimed. If anything, the research suggests that the issues are more complex than a simplistic condemnation of obscenity alone would allow." p. 33.

32. *R v. Coles* (1964), 49 D.L.R. (2d) 34.

33. *R. v. Brodie, Dansky and Rubin*, [1962] S.C.R. 681; 132 C.C.C. 161.

34. *Dominion News and Gifts (1962) Ltd. v. The Queen*, [1964] S.C.R. 251; [1964] 3 C.C.C. 1.

35. *R. v. Great West News*, [1970] 72 W.W.R. 354.

donkeys, “Animal Passion” depicting men having intercourse with (presumably non-consenting) cows, or “Women in Bondage” showing women being raped, whipped and tortured while informing the reader that women, however they protest, really enjoy this — then by all means let us have them. But let us also honestly acknowledge the characteristics and the social implications of the material we are dealing with.³⁶ The recurrent characteristics of pornography as they appeared to me in examining the Law Commission’s exhibits, are these:

(a) *Pornography’s Commercial Exploitation*: Professor Robert Samek of Dalhousie University has written an imaginative and compelling paper on the commercial exploitation aspect of pornography.³⁷ I content myself with expressing concurrence with his conclusions.

(b) *Pornography’s Brutality*: All pornography is brutal. Some, like “Women in Bondage”, “Kiss of the Whip”, “Orgies of Torture and Brutality”, “Satin Heels and Stilettos” and “The Pleasures of the Torture Chamber” explicitly so. The books just mentioned are a small but representative sample of the titles on display in any Canadian “adult” bookstore. I have chosen these specific titles because each was found (along with some fifty others) in the possession of Ian Brady and Myra Hindley, the “Moors” murderers who, in 1966, were convicted of torturing and killing three young children while taping their victims’ pleas for mercy and agonizing deaths. During cross-examination, the Attorney-General invited Brady to read out the titles found in his possession. Brady declined. The following exchange ensued:

A.G.: “They are all squalid pornographic books?”

Brady: “They cannot be called pornography. They can be bought at any bookstore.”

A.G.: “They are dirty books, are they not?”

Brady: “It depends on the dirty minds.”

A.G.: “This was the atmosphere of your mind.”

Brady: “No.”³⁸

36. Each of the magazines mentioned is or was on sale in Canada and was obtained by the Law Reform Commission for its obscenity study.

37. Samek, note 1 above.

38. Pamela Hansford Johnson, *On Iniquity*, Macmillan, London, 1967, p. 31.

Brady's responses would do proud any contemporary liberal foe of censorship. His assertion that squalor, like beauty, is not an objective reality but exists only in the eye of the beholder is frequently echoed today. Brady's answers illuminate the contemporary problem. While the courts fumble to determine when authors have "unduly exploited" the amorous exploits of their heroines, brutal and dehumanizing material is readily and cheaply (in paperback) available to any one who wants it. I realize no one can prove, or for that matter disprove, a causal connection between Brady's literary diet and his acts. But given the causal uncertainty, what risks should society run in allowing such brutal material to circulate unchecked? What countervailing "public good" is being served? What is its redeeming social value? And, in our uncertainty, what weight do we give to the lives of Brady's young victims?

In some pornography, brutality is implicit rather than explicit. It is "love-denying" and ultimately "life-denying". It exploits people as objects — devoid of human dignity. It conceives human beings as mechanistic assemblages of organs, orifices and orgasms. At the UNESCO Conference on Culture in 1970, *The Times* ran an editorial which captures this aspect: "Pornography always has in it somewhere a hatred of man, both of man as a human being able to respond to ideals, and of man as an animal. Pornography is not an affirmation but a denial of life, and commercial pornography is a denial of life for the sake of money."³⁹ The explicit brutality may be shrugged off as a vicarious outlet for a depraved few. The implicit brutality is more pervasive and just as worrisome.

(c) *Pornography's Threat to Socializing and Civilizing Influences*: Pornography exemplifies a kind of moral inversion. The socializing institutions, family, school and church all emphasize sex as inseparably linked to other values — procreation, love, affirmation, commitment. Pornography does the opposite. Its approach to sex is cold, mechanical and artificial. It disassociates sex from love and meaning. Its essence is barbaric — in the precise meaning of that word: "destructive, rude, cruel, savage, or harsh"⁴⁰ As such, its effect is socially debilitating. Prior to the Nazi invasion of Poland, it is reported that they flooded Polish bookstalls with pornography.⁴¹ Why? Is it not possible that they recognized

39. David Holbrook: *The Case Against Pornography*, *op. cit.* note 5 above.

40. Shorter Oxford English Dictionary.

41. Johnson, note 38 above, p. 18.

better than we that pornography assaults human empathy and thereby subverts social and political stability? Professor Ernest van den Haag has written: “. . . pornography deindividualizes and dehumanizes sexual acts; by eliminating all the context it reduces people simply to bearers of impersonal sensations of pleasure and pain. This dehumanization eliminates the empathy that restrains us ultimately from sadism and non-consensual acts.”⁴²

What redeeming quality is to be weighed against pornography's barbarism? Considered aesthetically, it is a dud — it has neither plot development, characterization or imagination. It is banal and tediously repetitive. Worse still, it is sufficiently pervasive to drag serious art and literature in its wake. Explicit and repetitive sex becomes the price of publication. Violence becomes an essential ingredient of movies. The economics of the box office dictate that the public's tolerance threshold of sex and violence be continually pushed further. Our tolerance of sexual barbarism brings not liberation from artistic restraint but a new and more dangerous form of artistic conformity. Actors and actresses unwilling to play sexual scenes lose parts; writers, unwilling to mince their plot with liberal doses of sex and violence lose publishers, or at least, sales. “The chief sin of pornography — and one must use that concept since pornography has become sacred today — is that it is not literature proper. No, much worse, that its intention and achievement are to dislocate literature from its vital role in the life of the individual and culture. Pornography negates imagination, style and the tradition of man's struggle to use language to know and enhance himself.”⁴³ Moreover, pornography misinforms and miseducates its readers. It deludes as to the capacities and limitations of the human body. It falsifies human sexual experience.⁴⁴

(d) *Pornography's Potential for Affective Consequences*: Of course, it cannot be proved that pornography “causes” sexual crimes. Notwithstanding the 2 million dollars spent on empirical studies by the U.S. Commission, no one can say with certainty what the effect of pornography is. Given the definitional imprecision and

42. Ernest van den Haag: *Is Pornography a Cause of Crime?* in Holbrook *op. cit.* n. 5 at 164.

43. Masud R. Khan, *Pornography and the Politics of Rage and Subversion*, in Holbrook *op. cit.* note 5 above, at p. 132.

44. *Ibid.*, at pp. 129-136. Khan brilliantly illustrates this by selecting and analyzing passages from de Sade and Polim.

the range of material included in such terms as "obscenity" or "pornography" it is perhaps not surprising that empirical research is inconclusive. The trouble is that law reform cannot wait upon final and conclusive answers. Lacking empirical evidence, what can usefully be said on this point?

First, the lack of empirical evidence is no obstacle to informed speculation. Speculative thought is a different sort of activity than data gathering, but no less useful and often as productive. It is significant that it is only today that the affective potential of pornography would be questioned. In times past, the potential of writing to influence behaviour was assumed. Indeed, a good part of our educational theory and practice, past and present, is predicated on that assumption. It was unquestioned that good literature was a civilizing influence, elevating man's vision and tempering his instincts. Samuel Johnson asked rhetorically: "What is the use of books if they are not to teach us how to live?" It could scarcely be disputed that Plato, Augustine, Dante, Shakespeare, Rousseau or Emerson influenced both the thought and behaviour of millions of people of their own and later generations. But if the affective potential of good writing is readily acknowledged, why is the affective potential of base writing so readily disputed?

No one would contend that literature alone can make one virtuous; few would contend that pornography alone can cause criminal acts. Reading de Sade is not sufficient to make one a sadist, perhaps not even necessary. But it does not follow that reading him has no effect. From the fact that not all readers of the Bible become Christians or act as such, and that some non-readers do, few people would conclude that the Bible has no influence. The question is might reading de Sade have some behavioural influence on some people? But is that possibility too tenuous to justify legal prohibitions? Yet do not the Criminal Code prohibitions on treasonous or seditious speech rest on the equally tenuous assumption that some people might possibly be swayed to subversive behaviour by an invitation to rebellion? And did we not, in Canada A.D. 1970, after exhaustive debate, decide that the potential affective consequences of hate literature justified criminal prohibition? And is not the market for pornography demonstrably greater, and its affective potential therefore more pervasive, than the "market" for either sedition or hate literature? Is it not at least possible that pornography is one (perhaps among several) contributing factors to some criminal behaviour? And, if so, always

the question recurs: what social good does it have to be balanced against the risk of social harm?

At the risk of repetition, the hate literature analogy should be pressed further. In the 1930's, German school children chanted from a Nazi school text: “. . .keeping company with evil people can be just as harmful as eating a poisonous mushroom. One may even die. . .And do you know who are these evil people, these poisonous mushrooms of mankind? Yes mummy, I know it — they are Jews. . .”⁴⁵ Can it be seriously contended that such literature did not have an attitudinal and cultural effect? And was that not carried through in behaviour? The potential affective consequences of such racist literature, forty years later in an unreceptive environment, were thought by the Parliament of Canada sufficiently dangerous to justify criminal prohibitions — notwithstanding the fact that the Special Committee which recommended the legislation found the situation “not alarming”⁴⁶ and wrote that “. . .none of the organizations involved represent today a really effective political or propaganda force and that, in any case, very few individuals are involved”.⁴⁷ Regrettably, the same cannot be said of the pornography industry.

The members of the Cohen Committee on Hate Propaganda were not insensitive to the freedom of expression issue; indeed, they wrote that there was a strong, but rebuttable, presumption in favour of freedom of expression which ought to be overcome only if vital community interests were threatened. But they were pragmatic enough to acknowledge that scurrilous literature can have a direct effect on at least short term behaviour: “. . .emotion displaces reason and individuals perversely reject the demonstrations of truth put before them, and forsake the good they know”.⁴⁸ Why is this true for brutal and dehumanizing hate literature and not true for brutal and dehumanizing pornography?

The Cohen Committee also considered whether hate literature had any redeeming social value and concluded that it did not. It was misinformed, unscientific, “corrosive”⁴⁹, and “. . .destructive to the central values of Judiac-Christian society, the values of our

45. Holbrook, note 5 above, at p. 5.

46. Report of the Special Committee on Hate Propaganda in Canada (the Cohen Committee) Queen's Printer, Ottawa p. 25.

47. *Ibid.*, p. 14.

48. *Ibid.*, p. 8

49. *Ibid.*, p. 25.

civilization'".⁵⁰ It had, in short, the same recurrent characteristics as pornography. But by a curious paradox, many people who favour criminal censorship of hate literature are adamant against criminal censorship of pornography. If the brutality of pornography were racially focused: e.g. a magazine depicting white men raping a black girl, or Nazi storm troopers torturing a Jewish woman, there would undoubtedly be cries for prohibition. Indeed, that type of pornography might presently fall within the definition of hate propaganda in section 281 of the Criminal Code.⁵¹ But why should humanity as such be less protected than any of the specific groups which compose it? That the brutality of pornography happens to be directed against women in general, rather than only against Negro or Jewish woman, makes it no less dangerous; indeed, just the opposite, it makes it just as dangerous but to more people.⁵²

(e) *Pornography's False Portrayal of Human Sexuality*: Both obscenity and pornography consistently misrepresent human sexuality. Men are pictured as always aggressive, always erect (or capable thereof) and usually brutal. Women are portrayed as mindless, submissive groupings of fleshly orifices, always available for men's gratification. Sex is not a joyous and loving act of affirmation, but detached, brutal and life denying. People copulate but do not talk; they grab but don't touch; they are preoccupied with sensation to the exclusion of feeling. Anyone who has perused pornography would find a drab humourlessness about it, a stolid banality. I read once of a man who went to a European pornographic show quite drunk and laughed loudly. He was angrily and immediately thrown out. Pornography and genuine human emotions, like laughter, don't mix. Harvey Cox has suggested that even the mildest obscenity, Playboy magazine and its imitators, are ultimately anti-sexual: they are "...the latest and slickest episode in man's continuing refusal to be human."⁵³ Impotence never hampers the men; the women never menstruate. Any mention of

50. *Ibid.*, p. 24.

51. Section 281.3(8): "Hate propaganda means any writing, sign or visible representation that advocates or promotes genocide. . . ." Section 281.1(2): "In this section 'genocide' means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely: (a) Killing members of the group, or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction."

52. I have drawn this point from van den Haag's brilliant essay, note 42 above.

53. Christianity and Crisis, April 17, 1961: "Playboy's Doctrine of the Male."

pregnancy or childbirth is strictly forbidden. The only dirty words too offensive for publication are chastity, impotence, sickness, fidelity, and death. Seldom is a playboy bald; never does a woman sag. Advertisements for trusses are banned from Playboy's pages.

This false portrayal of human sexuality is of special concern as it affects the young: "The greatest charge is the damage it does to the youngsters' 'image' of sex. Pornography degrades sex. It blinds the youngster to the higher values of sexuality. It reduces this noble function to a mere self-indulgence, a plaything with dirty overtones, connected with smutty words on the walls of the public toilet. . ."⁵⁴ But its effects are not limited to the young. Today greater numbers of people have enough money to afford pornography and sufficient reading ability to understand it. Unfortunately, many people have acquired education without erudition and literacy without taste. The economic vigour of the pornography industry attests the fact that it is not just the young who are vulnerable to the false picture it presents of human sexuality. Is it likely that our society's seeming preoccupation with sexual "performance", as evidenced by demand for "marriage manuals" and "sex aids", is unrelated to the prevalence of pornography? Is it conceivable that people could acquire a healthy understanding of human sexuality from pornography? My point, in a sentence, is that pornography is an enemy of sound sex education.

(f) *Pornography's Assault on Privacy*: In his introduction to the U.S. Commission Report on Obscenity and Pornography, Clive Barnes of the New York Times wrote: "There surely comes a point when obscenity, however urbanely presented, becomes an invasion of privacy."⁵⁵ I do not here mean the problem of involuntary access (i.e. unsolicited mail, billboards, store displays, etc.); rather, I am concerned to ask whether or not one is entitled to say: "Not only do I not wish to defecate or masturbate for public entertainment, but I wish also to prohibit others from doing so." Are some aspects of life sufficiently and inherently personal that they simply ought not to be allowed to be performed for the entertainment of others? On the surface this appears to be a restriction on liberty. If A and B wish for gain to perform sexual acts on the stage of the National Arts Centre, why should C be allowed to prohibit them? And yet is

54. Report of the Commission on Obscenity and Pornography, note 4 above, at p. 177.

55. *Ibid.*, Introduction.

C's "privacy interest" not somehow eroded or diminished by their performance?

What I am suggesting, and only tentatively, is that there is or ought to be a right to a private life; a right to private feelings and acts — which is inviolate against exposure by anyone. Even if the exposure is by someone other than the person asserting the right, the sanctity of his or her privacy has been impaired. A female student once told me that she would never pose nude herself for men's magazines because there are parts of the body which she regarded as private. But, given the similarities of human anatomy, her decision mattered little because her privacy was eroded by the monthly exposure in men's magazines of full colour, graphic pictures of nude women. Dr. George Steiner of Cambridge University has written: "Sexual relations are or should be one of the citadels of privacy, the night-place where we must be allowed to gather the splintered, harried elements of our consciousness to make some kind of inviolate order and repose." It is this "citadel of privacy" which pornography assaults. To quote Steiner again: " . . . pornography takes away the words that were of the night and shouts them over the rooftops, making them hollow".⁵⁶ In essence, my contention is that pornography always shifts the boundary line of the private citadel toward the public domain. So also does advertising, urbanization and technology. Personal privacy is, in fact, being eroded from many quarters. In the interest of individual and collective sanity, a vigorous claim to an inviolate zone of personal privacy needs to be asserted. Pornography is a good place to begin.

4. Law Reform: A Proposal

Whatever the offensive characteristics of pornography, the central question is: Ought the criminal law to concern itself with censorship? Is the social cost worth it? And if so, how best can it be done?

Pornography is, I submit, utterly without redeeming social value; it is offensive and potentially dangerous and ought to be prohibited. But that is easier said than done. Most pornography available in Canada is imported by mail either by the recipient himself, or by an adult bookstore for "under the counter" retail. To be effective, criminal prohibitions would require a more consistent pattern of

56. George Steiner, "Night Words" in Holbrook, note 4 above, at p. 235.

enforcement than the present random forays of local morality squads.

Obscenity is of dubious social value and shares, in part, the offensive and dangerous characteristics of pornography. Nevertheless, there are two important differences. Published obscenity usually makes some pretensions, however threadbare, to "serious" art or literature. For example, men's magazines will intersperse articles among their photographs; even pulp novels will attempt to organize the sexual encounters around some meagre plot. Human fallibility and censorships' inherent potential for abuse demand great caution. No civilized person wants to see contemporary authors again hounded by the zealous descendants of Bowdler and Comstock. Censorship of anything with even a tenuous claim to art or literature must be guarded against. Also, obscenity (as I have defined it) limits itself to sexual acts between consenting human beings. As such, it is entitled to greater tolerance than pornography. An ideal criminal law system would reflect these differences between obscenity and pornography.

But, first questions first: should the criminal law be concerned at all? Or is this unjustifiable paternalism? An attempt to save people from themselves? The simplicity of the question unfortunately defies an equally simple answer. I could envision circumstances in which censorship of pornography would be paternalistic. For example, if a majority, or even a substantial minority of Canadians, determined to practise necrophilia, and amuse themselves by looking at books and magazines about it, continuing the criminal prohibition (presently contained in section 178 of the Criminal Code)⁵⁷ could be justified only by a kind of moral paternalism. That is, although physically harmless, such conduct was so immoral that, whatever one's inclinations, one ought to be prohibited from engaging in it. In such a society, criminal prohibitions, however well-intentioned, would be ineffective. There is simply no use legislating in the teeth of fundamental community practices. It could be argued that a society given over to necrophilia would not deserve saving. But in any event, law could not save it. What Justice Learned Hand wrote about the spirit of liberty applies also to the spirit of public morality: "...it lies in the hearts of men and

57. Section 178: "Every one who (b) improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not, is guilty of an indictable offence and is liable to imprisonment for five years."

women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it, and while it is alive it needs no constitution, no law, no court to save it.”⁵⁸ But it seems highly unlikely that we have reached this stage with pornography. And, however objectionable to some, paternalism in the criminal law is here to stay. Objections to criminal prohibitions on pornography as paternalistic deserve the same credence as objections to criminal prohibitions on polygamy. Indeed, the latter have more cogency. Polygamy may accord with genuinely held religious beliefs, and criminal prohibitions may effectively require believers to choose between conformity to law or conformity to religious precepts. So far as I am aware, no group has yet made a sacrament of pornography.⁵⁹

Obscenity is a different matter. Playboy magazine and its imitators circulate freely and without undue public protest. Any supermarket bookrack will today contain paperbacks exploiting sex in ways that even Fanny Hill’s vivid imagination did not conceive. Society has tacitly condoned obscenity. The courts have attempted to set limits to it. Outright prohibitions on obscenity might be regarded as unduly paternalistic.

There are four primary objectives which any reform of obscenity law should strive to achieve. First, the law should distinguish between obscenity and pornography. Second, people should not be exposed involuntarily to either. Third, some more adequate method of gauging “contemporary community standards” must be sought. Finally, the social cost of enforcement ought not to be disproportionate to the benefits expected.

I suggest a new obscenity section of the Criminal Code making it an offence to make, print, publish, distribute, sell, or circulate for profit any “offensive publication”. “Offensive publication” would be defined in two subsections as follows (these are, at best, rough definitions requiring greater polishing):

- (a) “Obscenity: any publication shall be deemed to be obscene if a jury, properly instructed, finds that its effect, considered as a whole, is to unduly exploit sex.”

58. Learned Hand, *The Spirit of Liberty*, Papers and Addresses of Learned Hand, ed. by Irving Dilliard (Vintage Books, 1959), p. 144.

59. Although criminal prohibitions on narcotic drugs have been held to be inapplicable if the drugs are used for sacramental purposes: *People v. Woody* (1964), 61 Cal. (2d) 716; 394 P. (2d) 813.

(b) "Pornography: any publication shall be deemed to be pornographic if a jury, properly instructed, finds that its effect, considered as a whole, is to debase or degrade human beings, or to outrage contemporary standards of decency or humanity currently accepted in the community."

(c) "It is a question of fact for the jury whether a publication is an "offensive publication" within the meaning of this section."

The following section of the Code should provide:

"No person shall be convicted of an offence under this section if he establishes that he took sufficient effective precautions to ensure that the availability of any publication found to be obscene was confined to adult persons."

What is proposed, then, is a statutory distinction between obscenity and pornography. Criminal sanctions, including fines, imprisonment, and forfeiture of offending material, would follow upon conviction, after a jury trial, of publishing or distributing pornography. Section 159(3) (i.e. the defence of public good) would theoretically be available to the accused; but it must be exceedingly rare that it would be successful given the proposed definition of pornography.

Obscenity prosecutions, on the other hand, would involve a two-stage jury trial. First, the jury would have to determine whether the publication in question "unduly" exploited sex. The onus of proof would be on the Crown and expert evidence would (as now) be admissible. If the jury found that the publication was "obscene" the second stage would occur. Here the accused has the onus of establishing that he took "...sufficient, effective precautions" to ensure that minors were not exposed to this material.⁶⁰ This is a deliberately heavy onus. It seeks to make the person who profits from trading in obscenity the effective insurer against the risks of malfunctioning. Such a scheme could shift the cost of policing from

60. Special provisions are in order for minors at least on the basis that parents have the right to determine the education, including education about human sexuality, of their children. Criminal prohibition on sale of obscenity to minors is perfectly consistent with John Stuart Mill's "...one very simple principle" of liberty. Mill wrote: "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury." *The Six Great Humanistic Essays of John Stuart Mill, On Liberty*, ed. by W. Levi (Washington Square, 1963), pp. 135-6.

the taxpayer to those who reap profit from obscenity. It provides a great incentive to those in the obscenity business because it gives them criminal immunity so long as they police their operation to ensure that access to obscenity is limited to adults. By requiring that the precautions taken are both "sufficient" and "effective" the scheme requires the jury to see that the accused's policing system is adequate in practice and not just in theory.

This statutory defense and reverse onus of proof partially resolves the problem of involuntary access: i.e. those who object to having obscenity thrust upon them. Obviously, no proprietor who chose to openly display obscenity in his store window to random passers-by could claim to have restricted its availability solely to adults. I doubt that criminal law can go much beyond that. There are, of course, other statutes that deal with obscenity;⁶¹ the *Post Office Act*, in particular, can aid in prohibiting the mailing of unsolicited obscenity. However, further protection against involuntary access must come through the law of nuisance.

There are precedents for a two-stage trial process. The English *Prevention of Crimes Act* of 1908 required the jury to first try the accused on the charge presented then, on conviction, to have a separate trial to determine whether he was an "habitual criminal" and deserving of preventive detention. Our own Criminal Code provisions on preventive detention require two separate proceedings, although applications under section 690 are heard without a jury. Another precedent is the English *Sentence of Death (Expectant Mothers) Act* of 1931 which required that on conviction for murder of a woman who alleged to be pregnant, the jury should conduct a second trial, in advance of sentencing, to determine the authenticity of her allegation.⁶²

A jury trial is the only honest procedure if we are to continue to pay lip service to judging offensive literature by a "contemporary community standards" test. Nothing in the judicial process is as futile or as derisory as a Judge setting for himself the task of deciding whether ". . .the exploitation of sex. . .is undue in the sense that it exceeds that limit of acceptability or tolerance which is to be tested by the contemporary Canadian community."⁶³ Apart from the difficulty of finding a consensus in the "contemporary

61. Principally, *Post Office Act* R.S.C. 1970 c. P-14, and *Customs Tariff Act*, Schedule C, item 99201-1, R.S.C. 1970 c. C-41.

62. C. H. Rolph, *Books in The Dock* (London: Andre Deutsch, 1969), p. 138.

63. *R. v. O'Reilly and Four Others*, (1970), 1 C.C.C (2d) 24 (Ont. Co. Ct.), at

Canadian community'' on the least controversial of topics (witness any Gallup poll) who could be less qualified than Judges, uniformly drawn as they are from the same background, education and career, to discern it? The farce becomes unsustainable when two judges in the same city, with the same background and training, themselves disagree about whether the work in question violates these perceived standards.⁶⁴

Of course juries may also come to inconsistent conclusions. But the jury is a great deal more representative than a judge, more in touch with community mores, and (no disrespect intended) more likely to be practical and sensible in such matters than a judge. Also, twelve heads are better than one even if the one is legally-trained to determine a question that essentially requires a representative cross-section of normative opinion. Also, the jury ensures that the test of obscenity is local rather than national. At present, the standard applied is supposed to be national although, of course, the actual standard applied (if any) must inevitably be local. An acknowledged local standard is preferable on the merits — after all, why should the literary choices of Torontonians be circumscribed by the residents of Rosewater, Saskatchewan or vice versa — but also as a small contribution to public honesty, and a large contribution to the demythologization of the legal system. To those who mistrust juries (after all, what if a Mississippi jury decided that pictures of blacks and whites together are obscene?) there are several rejoinders, none alone satisfactory, but collectively reassuring. First, (unless I can handpick my judge, which is unfair) I prefer the collective good sense of the jury to that of a single judge. Secondly, the jury's power here is not absolute. It is constrained in three ways: (1) by the ordinary power of a trial judge to refuse to allow a case to go to the jury on the basis that there is no evidence; (2) by the judge's responsibility to sum up the evidence and direct the jury on the law; (3) by the supervisory jurisdiction of appeal courts.

The moral judgements of a society must ultimately be decided by its citizens. But it is not feasible to put every question involving

37. For a critical analysis of the role of the Judiciary in obscenity cases, see my comment on this case in (1971), 13 *Crim. L.Q.* 184-195.

64. As happened in *R. v. O'Reilly*, judicial disagreement is common in obscenity cases. *Lady Chatterly's Lover* was found to be obscene by more Judges than not; however, those Judges for acquittal constituted a majority of one in the Supreme Court of Canada.

moral judgement to popular referendum so that each citizen has his say. Some decisions are delegated to a representative cross-section of citizenry: the jury. Of course, with the benefit of hindsight, the jury may make wrong or perverse decisions. So may any other person or institution. But wrong decisions are not immutable. They can be changed by new laws. I do not subscribe to Blackstone's view that juries are "the glory of English law". In most civil cases, and many criminal cases, the jury trial is disappearing and good riddance to it. As a method of fact determination, it is poor. The American historian, Carl Becker, has written: "Trial by jury, as a method of determining facts, is antiquated. . . and inherently absurd — so much so that no lawyer, judge, scholar, prescription-clerk, cook or mechanic in a garage would ever think for a moment of employing that method for determining the facts in any situation that concerned him."⁶⁵ But for sensing and applying the shifting moral standards of a community, we have no better alternative.

Obscenity originated with sedition and blasphemy. Over time, it has come to mean "undue exploitation of sex". I suggest that this should no longer be the concern of the criminal law, so long as (a) "legalizing" obscenity does not automatically mean legalizing pornography along with it; and (b) if an effective, inexpensive policing system to guard against corruption of children can be devised. It is submitted that the scheme proposed does this. It also provides a more sensible method of gauging the moral judgements of the community. If adults choose to indulge in obscenity and are somehow "corrupted" by it, they are the authors of their own misfortune. Their "injuries" are self-inflicted, and they, not society, bear responsibility:

65. Quoted in Jerome Frank: *Courts on Trial* (New York: Atheneum, 1969), p. 124.